Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO *and* CBS, Inc. and United Scenic Artists, Local 829, International Brotherhood of Painters and Allied Trades, AFL–CIO. Case 2–CD–664

September 10, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by CBS, Inc., herein called the Employer, alleging that Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO, herein called Local One, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by United Scenic Artists, Local 829, International Brotherhood of Painters and Allied Trades, AFL–CIO, herein called Local 829.

Pursuant to notice a hearing was held before Hearing Officer Dennis M. Haggerty on May 20, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's ruling made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a New York corporation with its principal place of business in New York City, is engaged in interstate communications by radio and television as well as other enterprises, and derives an annual gross income therefrom exceeding $1 million. It receives in New York State directly from points directly outside New York State materials having an annual value exceeding $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purpose of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Local One and Local 829 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The parties stipulated, and we find, that the work in dispute involves the assignment of the Flexwood installation work to be performed in connection with shows in TV studios of the Employer in New York City. Flexwood is a trade name for a wood veneer product with a canvas-mesh backing.

B. *Background and Facts of the Dispute*

The Employer maintains a large television studio set construction shop in New York City. Carpenters represented by Local One perform most of the work done in the shop. Scenic artists represented by Local 829 work at one end of the shop on wall coverings of a scenic or artistic nature. The Employer has had collective-bargaining agreements with both Unions for approximately 30 years. The Employer used Flexwood for the first time in 1973 or 1974 when it constructed a national election set. The installation of Flexwood was assigned to employees represented by Local One, and Local 829 did not protest the assignment. The Employer next used Flexwood when it built a sports set in 1981 and it again assigned the installation of Flexwood to Local One-represented carpenters. Both Local One-represented carpenters and Local 829-represented scenic artists experimented with adhesives to be used in applying Flexwood. No more than four of the experimental Flexwood panels completed by Local 829-represented scenic artists, however, were incorporated into the finished set which contained over 70 such panels. Local 829 grieved the assignment of the disputed work to carpenters represented by Local One. Pursuant to the grievance, an arbitration hearing was held on October 13, 1981, which was attended only by the Employer and Local 829.[1] On October 21, 1981, the arbitrator issued his decision splitting the installation of Flexwood among the employees represented by Local

[1] Local One was neither a party to, nor given the opportunity to participate in, the grievance arbitration. Indeed, the record indicates that Local One first learned of the proceeding in early 1982.

829 and Local One in accordance to their relevant skills.

In early 1982, the Employer needed a television studio set for its morning news program. The plans called for applying Flexwood to desks, tables, cabinets, platforms, and panels. The Employer, in compliance with the arbitrators's decision, split the Flexwood work between Local One-represented carpenters and Local 829-represented scenic artists. On February 22, 1982, Raleigh Banks, the business agent for Local One, telephoned the Employer's vice president for industrial relations, Noel Berman, and told him that if the Employer assigned Flexwood work to any employee represented by Local 829, he would deny the Employer the services of the employees represented by Local One. Banks followed up the telephone conversation with a telegram to Berman the same day. Banks maintained in the telegram that employees represented by Local One had "exclusive jurisdiction over all work involved in applying Flexwood" and placed the Employer on notice that if it assigned the Flexwood work to employees represented by Local 829, Local One would engage in a "job action" against the Employer.

C. *Contentions of the Parties*

The Employer and Local One contend that the work in dispute should be assigned to employees represented by Local One on the basis of employer preference, company and industry practice, skills, and economy and efficiency of operation.

Local 829 takes the position that its collective-bargaining agreement, the arbitration award, skills, and efficiency of operation favor awarding to employees represented by Local 829 the work of applying Flexwood to scenic elements.

D. *Applicability of the Statute*

Before the Board may proceed with a Decision and Determination of Dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The record indicates that in February 1982 a business agent for Local One claimed exclusive jurisdiction over the disputed work and threatened to withhold the services of employees represented by Local One as well as to engage in a "job action" if any of the disputed work was assigned to employees represented by Local 829. The parties stipulated that no method exists for voluntarily resolving the dispute.

Based on the foregoing, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

There is no evidnece to show that either Local One or Local 829 has been certified by the Board as the representative of employees performing the work in dispute. The Employer, however, has had a series of collective-bargaining agreements with Local One and Local 829. Although the current agreements with the two Unions contain jurisdictional clauses which describe the work to be performed by employees represented by them, neither agreement specifically discusses the work in dispute. Accordingly, we find, that this factor does not favor awarding the disputed work to employees represented by either Local One or Local 829.

2. Arbitration award

As previously indicated, Local 829 filed a grievance against the Employer over the assignment of the disputed work and the arbitrator divided the work between the employees represented by Local One and the employees represented by Local 829 according to their respective skills. Local One, however, had no knowledge of, did not participate in, and did not agree to be bound by the arbitrator's decision. We therefore find that the arbitration award is of no significant help in the determination of the instant dispute.[4]

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[2] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[4] See, e.g. *International Brotherhood of Teamsters, Local 222 (Emery Mining Corporation)*, 262 NLRB No. 132 (1982); and *International Longshoremen's Association, Local No. 1830, AFL-CIO (Ryan-Walsh Stevedoring Company, Inc.)*, 256 NLRB 608, 611 (1981).

3. Employer's past practice

The Employer, in accordance with its tradition of assigning work with wood to Local One-represented carpenters, assigned the disputed work to employees represented by Local One when it constructed a national election set in 1973 or 1974. When the work was performed next, in 1981, the Employer again assigned it to Local One-represented carpenters. The carpenters performed all of the work in dispute, except for four Flexwood panels installed by Local 829-represented scenic artists on an experimental basis. Inasmuch as the set contained over 70 Flexwood panels, we find any work done by Local 829-represented scenic artists to be *de minimis*. Accordingly, we conclude that the Employer's past practice favors awarding the work exclusively to employees represented by Local One.

4. Industry practice

The Employer's director of design and productions services, Michael Pakalik, testified that he had conversations with his counterparts at ABC, NBC, and an outside shop named Lincoln Scenic as to their experience with Flexwood, and that the consensus was that the application or the installation of Flexwood would be for employees represented by Local One. Consequently, we find that the factor of industry practice favors awarding the work in dispute exclusively to employees represented by Local One.

5. Relative skills

The record discloses that tools such as band saws, jointed planes, sandpaper, sanding machines, nails, rasps, chisels, routers, wood glue, and rollers are used in installing Flexwood which is a wood veneer with a canvas-mesh backing. Pakalik testified that employees represented by Local One are expert carpenters whose training is wood related. Local One-represented carpenters regularly work with different types of wood products and in doing so they use all the aforementioned tools that are necessary to install Flexwood. In contrast, Local 829-represented scenic artists install wall coverings which are usually wallpaper, and their backgrounds are in paint blending, paint mixing, and plastering. Local 829-represented scenic artists regularly use brushes, razor blades, sponges, and extremely fine grades of sandpaper. The limited number of Flexwood panels installed by Local 829 was done with glue, brushes, and rollers. Inasmuch as Local 829-represented scenic artists do not possess the requisite skills to operate all of the carpentry tools utililzed in performing the disputed work, we find that the broader skills of Local One-represented carpenters favor awarding the work exclusively to employees represented by Local One.

6. Employer preference, economy, and efficiency of operation

The Employer has stated that it prefers to have the disputed work performed exclusively by employees represented by Local One and that it assigned a portion of the work in dispute to employees represented by Local 829 only to comply with the 1981 arbitration decision. In addition, Director Pakalik testified that the Employer would have to hire additional employees if the work in dispute were assigned exclusively to employees represented by Local 829. We find this factor favors awarding the work exclusively to employees represented by Local One.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Local One are entitled to exclusively perform the work in dispute. We reach this conclusion relying on the Employer's past practice, industry practice, skills, the Employer's preference, and economy and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees of CBS, Inc., who are represented by Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, are entitled to perform the work of installing Flexwood on television studio sets of CBS, Inc., in New York, New York.